

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Mailed:
September 14, 2007
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Fuzzi S.P.A.

v.

Dennis Warren Wysinger

Opposition No. 91169274
against Serial No. 78556355

Paul G. Juettner of Greer, Burns & Crain, Ltd. for Fuzzi
S.P.A.

Dennis Warren Wysinger, *pro se*.

Before Quinn, Bucher and Bergsman, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Dennis Warren Wysinger, a U.S. citizen and resident of
California, seeks registration on the Principal Register of
the mark **FIUFE** (*in standard character format*) for goods
identified in the application as "T-shirts, hats, beanies,

shirts, coats, jerseys, sweatshirts, pants, shoes, socks, underwear" in International Class 25.¹

Fuzzi S.P.A., an Italian joint stock company, has opposed registration on the ground of priority of use and likelihood of confusion, alleging that applicant's mark, when used in connection with the identified goods, so resembles opposer's previously used mark, **FIUME** (*also in standard character format*) registered on the Principal Register by opposer for goods identified as "jackets, pullovers, shirts, trousers, scarves, hats, skirts and dresses" in International Class 25,² as to be likely to cause confusion, to cause mistake or to deceive under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d).

Applicant, in his answer, has denied the salient allegations in the opposition.

¹ Application Serial No. 78556355 was filed on January 28, 2005 based upon applicant's allegation of a *bona fide* intention to use the mark in commerce.

² Registration No. 2755241 issued to Sima Fashion S.P.A., an Italian joint stock company, on August 26, 2003, based upon an application filed on December 28, 2001, containing allegations of first use anywhere and first use in commerce at least as early as December 1979. An assignment to Fuzzi S.P.A., by merger, was duly recorded with the Assignment Division of the United States Patent and Trademark Office at Reel 2872/Frame 0614.

The Record

By operation of the rules, the record includes the pleadings and the file of the opposed application. Opposer, as part of its case-in-chief, has made of record its pleaded registration by submitting a certified status and title copy of the registration showing that it is subsisting and is owned by opposer. Opposer, also as part of its case-in-chief, has made of record opposer's First Notice of Reliance, submitted December 14, 2006, consisting of applicant's answers to opposer's First Set of Interrogatories served June 8, 2006, and opposer's First Set of Requests to Admit served on applicant on September 8, 2006. Opposer further sought to introduce its Second Notice of Reliance, submitted March 30, 2007, consisting of a March 1, 2007 printout of applicant's website, www.fiufe.com, a March 28, 2007 printouts from the website www.cafepress.com, and the executed declaration of Paul G. Juettner, opposer's counsel, dated March 30, 2007.³

³ Under 37 CFR § 2.122(e), a party may introduce material into evidence by Notice of Reliance if it consists of printed publications, such as books and periodicals, and is available to the general public in libraries or of general circulation among members of the public. However, because the printout of applicant's website, the printout of the third-party website and the declaration of opposer's counsel are not subjects properly made of record through a notice of reliance, they have not been given any consideration.

As part of his case-in-chief, applicant has made of record his Notice of Reliance, submitted February 13, 2007, consisting of, *inter alia*, emails from AplusNet Support dated January 23, 2005 and January 25, 2007, regarding successful registration and renewal of www.fiufe.com, respectively.⁴

Factual Findings

Opposer

Opposer, Fuzzi S.P.A., is an Italian Joint Stock company having its principal place of business in Italy. Opposer is engaged in the manufacture and distribution of textiles and clothing.

Applicant

Although applicant, Dennis Warren Wysinger, has filed the involved intent-to-use application, the record shows that he has neither used the **FIUFE** mark nor has he taken any steps to begin use of this mark other than registration of the domain name www.fiufe.com.

⁴ Similarly, inasmuch as these emails are not properly made of record through a notice of reliance, they have not been given any consideration.

Preliminary matters

According to the record herein, opposer's First Set of Requests to Admit was served on applicant on September 8, 2006 by First Class Mail. More than three months later, on November 11, 2006, in response to opposer's Notice of Reliance, applicant asserted that he never received the Requests to Admit. However, applicant has not requested leave to answer, has not otherwise attempted to answer, and has not denied the truth of the Requests to Admit. Accordingly, the subject matter of these requests⁵ is deemed admitted. *Fram Trak Industries, Inc. v. Wiretracks LLC*, 77 USPQ2d 2000 (TTAB 2006); and Fed. R. Civ. P. 36(a).

In spite of the fact that these admissions could be determinative of the issue of likelihood of confusion, in the interest of completeness, we will nonetheless make a determination, in the alternative, weighing all of the relevant *du Pont* factors.

⁵ For example, Request No. 9 reads as follows: "Admit that the FIUFE mark so resembles Opposer's FIUME mark as to be likely, when applied to the goods set forth in Applicant's application, to cause confusion, mistake or deception within the meaning of Section 2(d) of the Trademark Act." (Opposer's First Set of Requests to Admit to Applicant, Request No. 9).

ANALYSIS

Standing

Opposer's standing is a threshold inquiry made by the Board in every *inter partes* case. In Ritchie v. Simpson, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999), the Court of Appeals for the Federal Circuit enunciated a liberal threshold for determining standing, i.e., whether one's belief that one will be damaged by the registration is reasonable and reflects a real interest in the case. See also Jewelers Vigilance Committee Inc. v. Ullenberg Corp., 823 F.2d 490, 2 USPQ2d 2021, 2023 (Fed. Cir. 1987); and Lipton Industries, Inc. v. Ralston Purina Company, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). We find that opposer has established its standing in view of its demonstrated ownership of its subsisting **FIUME** registration.

Priority

With regard to the issue of priority in relation to the goods set forth in opposer's pleaded registration, because opposer has established that it owns a valid and subsisting registration of its pleaded mark, the issue of priority does not arise. See King Candy Company v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA

1974); and Carl Karcher Enterprises Inc. v. Stars Restaurants Corp., 35 USPQ2d 1125 (TTAB 1995).

Likelihood of Confusion

We turn, then, to the issue of likelihood of confusion under Section 2(d) of the Trademark Act. Specifically, the focus of our determination is on the issue of whether applicant's mark, when used in connection with "T-shirts, hats, beanies, shirts, coats, jerseys, sweatshirts, pants, shoes, socks, underwear," so resembles opposer's mark as to be likely to cause confusion, to cause mistake or to deceive as to source or sponsorship.

Our determination must be based upon our analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the services and differences in the marks." See *Federated Foods, Inc. v. Fort Howard Paper*

Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

The Goods

Both opposer and applicant have included in their respective identifications of goods "shirts" and "hats." The balance of the parties' goods are all closely-related articles of clothing. Accordingly, we find that the parties' respective marks would be used in connection with identical and/or closely-related goods.

Channels of Trade

Where the goods are identical and/or closely related, and neither has any limitations as to channels of trade, we must presume that they would move through the same channels of trade. Hence, this *du Pont* factor also favors the position of opposer herein.

Classes of Consumers

As to the *du Pont* factor focusing on the conditions under which and buyers to whom sales are made, we must also presume that the goods will be marketed to all the usual classes of consumers for such goods, including ordinary

consumers who normally retain a general rather than a specific impression of trademarks. *Centraz Industries, Inc. v. Spartan Chemical Company, Inc.*, 77 USPQ2d 1698 (TTAB 2006); and *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). The fact that ordinary consumers will be purchasing these goods without a high degree of care also favors a finding of likelihood of confusion.

The marks

We begin this part of the analysis mindful of the fact that when marks would appear on identical or virtually identical goods, the degree of similarity in the marks necessary to support a conclusion of likely confusion declines. *Century 21 Real Estate Corp. V. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

We also agree with opposer that when these two marks are compared in their entirety, opposer's **FIUME** mark and applicant's **FIUFE** mark are similar in appearance, sound, connotation and commercial impression.

As to appearance, applicant's **FIUFE** mark is identical in appearance to opposer's **FIUME** mark except for a switch of hard consonants in the position of the fourth letter.

Both are presented in standard character formats. As to pronunciation, only the third syllable in applicant's mark has a slightly different sound -- "-fē" rather than "-mē." As to meaning or connotation, the ordinary consumer, upon seeing these respective marks would likely perceive both as foreign-language words or as arbitrary terms.⁶ Hence, we find that these mark are quite similar as to commercial impression, and that this *du Pont* factor too weighs in favor of a conclusion of likelihood of confusion.

Conclusion

We find that the goods are identical and otherwise closely related; that they will move through the same channels of trade to the same classes of ordinary purchasers; and that the marks are similar as to appearance, sound, meaning and commercial impression.

Decision: The opposition is sustained under Section 2(d) of the Lanham Act, and registration to applicant is hereby denied.

⁶ Although applicant contends that his mark is an acronym for "F***n' It Up For Everybody," (Applicant's answers to opposer's First Set of Interrogatories, Answer No. 2; and Opposer's First Set of Requests to Admit, Request No. 5), we find no reason in the record to conclude that the ordinary consumer, upon seeing the term FIUFE, would know of this alleged derivation.